

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

JPMORGAN CHASE BANK, N.A., in its capacity)
as agent for Associated Bank, N.A., Bank of)
America, N.A., JPMorgan Chase Bank, N.A., Fifth)
Third Bank, M&I Marshall & Ilsley Bank, and)
Union Bank of California, N.A.,)

Case No. 1:09-cv-03720

Plaintiff,

Hon. Judge Ronald A. Guzman

v.

Hon. Magistrate Judge Nan R. Nolan

FBOP CORPORATION, a bank holding company)
organized under the laws of the State of Illinois,)

Defendant.)

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT I

Plaintiff JPMorgan Chase Bank, N.A. ("Agent"), a national bank, in its capacity as Agent for the following lenders: Associated Bank, N.A., Bank of America, N.A., Fifth Third Bank, JPMorgan Chase Bank, N.A., M&I Marshall & Ilsley Bank, and Union Bank of California, N.A. (collectively, the "Lenders"), hereby moves this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1, for summary judgment on Count I against Defendant FBOP Corporation ("Borrower"). Agent files herewith: (1) Plaintiff's Motion for Leave To Voluntarily Dismiss Count II of Its Complaint or, Alternatively, For Leave To File An Amended Complaint; (2) Plaintiff's Memorandum of Law in Support of its Motion for Summary Judgment as to Count I; (3) Plaintiff's Local Rule 56.1(a)(3) Statement of Undisputed Material Facts in Support of Its Motion For Summary Judgment; and (4) Index of Exhibits (and accompanying Exhibits) in Support of Plaintiff's Motion for Summary Judgment and in Support of Plaintiff's Local Rule 56.1(a)(3) Statement of Undisputed Material Facts.

In support of its Motion, Agent states as follows:

1. This is a straightforward case that lacks a genuine issue as to any material facts. Agent and Lenders loaned the principal balance of \$246,000,000, payable in full on May 28, 2009, to Borrower. Borrower is in breach of its obligations for failure to pay the amounts due under the credit agreement and matured promissory notes.

2. In this lawsuit, and by this motion, Agent seeks collection on, and enforcement of, Borrower's obligations under the executed credit agreement and promissory notes. Because there is no genuine issue as to any material fact concerning Borrower's breach of the credit agreement and promissory notes, Agent moves for summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure in Agent's and Lenders' favor and against Borrower as to Count I of the Complaint.

3. Borrower filed a Motion to Dismiss Complaint for Failure to Join Indispensable Parties on July 13, 2009, on the ground that Agent failed to join indispensable parties to this case, namely certain subordinated debt holders that are referenced for the purpose of Count II of the Complaint. However, Agent's Motion for Leave to Voluntarily Dismiss Count II or, Alternatively, for Leave to File an Amended Complaint, filed simultaneously herewith, obviates the need for briefing on the Borrower's Motion to Dismiss.

4. Although there is no answer to Count I of the Complaint, Federal Rule of Civil Procedure 56(a)(1) and case law allows the Court to consider, without any qualifications, Agent's Motion for Summary Judgment given that 20 days have passed since the commencement of this action on June 19, 2009. Fed. R. Civ. P. 56 ("A party claiming relief may move...for summary judgment on all or part of the claim. The motion may be filed any time after: (1) 20 days have passed from commencement of the action..."); *see also Pennsylvania*

Higher Education Assistance Agency v. Kaminsky, Case No. 08-402-GPM, 2009 U.S. Dist. LEXIS 52369 (S.D. Ill. June 22, 2009) (court simultaneously considered lender's motion for summary judgment and borrower's motion to dismiss); *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir. 1965) (motion for summary judgment and motion to dismiss simultaneously considered).

5. Agent submits that its Motion for Summary Judgment should be considered simultaneously with consideration of any responsive pleading that Borrower files with respect to Count I because there is no genuine dispute that the loans have matured and the outstanding balances are due and owing.

WHEREFORE, and for the additional reasons set forth in Plaintiff's Memorandum of Law, Plaintiff JPMorgan Chase Bank, N.A., in its capacity as Agent for the following lenders: Associated Bank, N.A.; Bank of America, N.A.; Fifth Third Bank; JPMorgan Chase Bank, N.A.; M&I Marshall & Ilsley Bank; and Union Bank of California, N.A.; respectfully requests that this Court grant this motion for summary judgment on Count I against Defendant FBOP Corporation and enter judgment in Plaintiff's favor and against FBOP Corporation as follows:

A. Awarding summary judgment in favor of Agent, for itself and the benefit of the Lenders, and against Defendant Borrower, FBOP Corporation, on Count I;

B. Awarding judgment in Agent's favor, for itself and the benefit of the Lenders, in an amount equal to all amounts due under the Credit Agreement and Notes (as defined in Plaintiff's Memorandum of Law), including amounts for interest at the default rate, post-judgment interest at the rate set forth in the Credit Agreement and Notes, and attorneys' fees and expenses incurred in enforcing Agent's and Lenders' rights under the Credit Agreement and Notes and in collecting the amounts owed under the Credit Agreement and Notes of not less than \$247,556,461.16 as of May 28, 2009, which amount continues to accrue and increase; and

C. Awarding such other and further relief as this Court deems just and proper.

Dated: July 20, 2009

Respectfully submitted,
JPMORGAN CHASE BANK, N.A.,
in its capacity as agent for Associated Bank, N.A.,
Bank of America, N.A., JPMorgan Chase Bank, N.A.,
Fifth Third Bank, M&I Marshall & Ilsley Bank, and
Union Bank of California, N.A.

By: s/ Jessica Perez Simmons

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